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No. 94-360

In The

Supreme Court of the United States

October Term, 1994

HOSOYA FIREWORKS CO., LTD.,
a Foreign Corporation,

Petitioner,

v.

BERNARD BARONE, an Individual,
and HIGHLAND COUNTRY CLUB,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

Bernard Barone, an Individual, and Highland Country Club, respectfully oppose a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610 (8th Cir. 1994).

The opinion of the United States District Court for the District of Nebraska is unreported.

STATEMENT OF THE CASE

A. Factual Background.

On July 4, 1988, Respondent, Bernard Barone, ("Barone") a Nebraska citizen, employed by Respondent Highland Country Club ("Highland"), a Nebraska Corporation, was assisting in the production of a fireworks display in Omaha, Nebraska, when a six inch mortar shell prematurely detonated, causing severe personal injuries to Barone, including brain damage and loss of his left eye. Respondent filed suit against Rich Bros. Interstate Display Fireworks Company ("Rich Bros."), a South Dakota Corporation, with its principal place of business in South Dakota, the Peoples' Republic of China, doing business as the Chinese National Produce and Animal By Products Import and Export Corporation and Hosoya Fireworks Company Limited ("Hosoya"), a foreign corporation located in Tokyo, Japan. (The references to the Appendix refer to the Petitioner's Appendix.) (Pet. App. 2) Respondents allege that the injury to Barone occurred due to a defect in the shell manufactured by Hosoya or the Chinese Corporation who subsequently sold it to Rich Bros. who in turn sold it to Highland. (Pet. App. 16)

Hosoya manufactured and shipped fireworks, classified as Class B explosives by the United States Department of Transportation, throughout the United States. (Pet. App. 3) During the years 1983 to 1988 (the years

immediately preceding the accident), Hosoya utilized nine distributors in six states (California, Indiana, Missouri, Ohio, Pennsylvania and South Dakota). (Pet. App. 3) Those nine American distributors annually purchased between $ 250,000.00 and $ 1,000,000.00 worth of fireworks (averaging $ 640,000.00 annually over the six year period). This constituted between 51% and 92% (averaging just over 70%) of Hosoya's fireworks business. Rich Bros. purchased just over $ 600,000.00 worth of fireworks from Hosoya during this period, averaging just over $ 100,000.00 annually. Approximately $ 100,000.00 worth of fireworks over the six year period, or $ 16,000.00 annually, of the fireworks purchased from Hosoya were eventually resold into Nebraska. (Pet. App. 4)

Rich Bros. sells its fireworks displays through six regional salesmen and through a catalog by mail. The six salesmen were located in Nebraska, Iowa, North Dakota, Montana and South Dakota. The fireworks sold by Rich Bros. were intended for use by municipalities or organizations that put on fireworks displays. Many of its catalogs, for example, were sent to small town fire departments because its experience had been that those institutions were often responsible for the fireworks displays at various community celebrations. (Pet. App. 4)

Business was conducted between Hosoya and Rich Bros. in the following fashion: Hosoya would send price lists, purchase terms, shipping information and proof of compliance with various federal regulations to Rich Bros. (Pet. App. 5) At no time did Hosoya place limits on the distribution of Hosoya's products by Rich Bros. The shells manufactured by Hosoya were packaged at Hosoya's factory in Japan and were shipped by Hosoya to

Rich Bros. Rich Bros. received the shells from Hosoya in finished form and distributed the fireworks product in identical form to the purchaser. Representatives of Hosoya visited Rich Bros. in Sioux Falls, South Dakota, for the purpose of soliciting the purchase of their fireworks. (Pet. App. 5)

B. Procedural Background.

On November 14, 1988, Respondents filed this action pursuant to 28 U.S.C. § 1332 in the United States District Court for the District of Nebraska seeking to recover damages arising out of the July 4, 1988 accident. On April 8, 1992, Petitioner filed in the District Court a Motion to Dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)2 for the reason that the District Court lacked personal jurisdiction over Petitioner. On October 29, 1992, the District Court issued a Memorandum Opinion and Order granting Petitioner's Motion to Dismiss. (Pet. App. 19) The Court held that no significant minimum contacts existed between Hosoya and the State of Nebraska. Respondents appealed the decision of the District Court to the United States Court of Appeals for the Eighth Circuit. On May 24, 1994, the Court of Appeals entered a judgment reversing the decision of the District Court. In making its deter-mination, the Eighth Circuit Court of Appeals followed the precedent established by this Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny. Specifically, the Court found that Petitioner's conduct and activities were such that it did have sufficient minimum contacts with Nebraska and that it was fair and reasonable to subject Petitioner to Nebraska jurisdiction. (Pet. App. 13)

After the Court of Appeals issued its judgment, Petitioner filed a Petition for Rehearing and Suggestion For Rehearing En Banc, which was denied by the Court of Appeals on July 1, 1994. (Pet. App. 24)

I. INTRODUCTION

Petitioner argues that this Court should grant its Petition for a Writ of Certiorari because the decision of the Eighth Circuit Court of Appeals is in conflict with both the decisions of this Court and other Federal Courts of Appeal. (Pet. Brief 9) A thorough review of the facts as they apply to the requirements of due process demonstrates that no such conflict exists. Rather, such an analysis reveals that the Eighth Circuit Court of Appeals rendered its decision in accordance with the requirement of due process as set forth by this Court and followed by the Federal Courts of Appeal. Nebraska's exercise of jurisdiction over Petitioner comports with the requirements of due process; thus it is unnecessary for this Court to grant certiorari to review this matter.

REASONS FOR DENYING THE PETITION

A. The Court of Appeals' interpretation of the "stream of commerce" doctrine in *Barone* does not conflict with decisions of this Court.

1. The governing standards of jurisdiction as established by this Court.

This Court established a two-pronged test to determine whether personal jurisdiction may be properly

exercised over a defendant. First, due process requires that the defendant have certain minimum contacts so as not to "offend 'traditional notions of fair play and substantial justice' ". *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). Furthermore, in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), this Court held that the minimum contacts standard is satisfied where the defendant "has purposefully availed itself of the privilege of conducting activities within the forum state, thus evoking the benefits and protection of its laws."

Second, due process mandates that "the relationship between the defendant and the forum must be such that it is 'reasonable . . . to require the corporation to defend the particular suit which is brought there' " *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); citing *International Shoe*, 326 U.S. at 317. It is essential that in all cases, "the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that state." *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978). This requirement of due process protects a defendant against the burden of litigating in distant or inconvenient forums and it acts to insure that states do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-292.

It is necessary to examine "the relationship among the defendant, the forum, and the litigation . . . [which becomes] the central concern of the inquiry to personal jurisdiction" *Schaffer v. Heitner*, 433 U.S. 186, 204 (1977). Therefore, a nonresident corporate defendant is subject to

the jurisdiction of the forum state when it "purposefully directed" his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-780 (1984) and the litigation results from the alleged injuries that "arise out of or relate to" those activities, *Helicopteros Nationales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

It is these principles that govern the determination of whether Petitioner is subject to personal jurisdiction in Nebraska.

2. Pursuant to the governing principles as established by this Court, Petitioner has sufficient minimum contacts to be properly haled into court in Nebraska.

a. Petitioner could reasonably anticipate being haled into court in Nebraska.

In *World-Wide Volkswagen Corp. v. Woodson*, the Court stated "the prosecution against inconvenient litigation is typically described in terms of reasonableness or fairness". *Id.* at 444 U.S. at 292. In applying this to the facts at hand, this Court in *World-Wide* stated:

> The foreseeability that is critical to due process analysis is not a mere likelihood that a product will find its way into the forum State. Rather it is that the Defendant's conduct in connection with the forum State are such that he should reasonably anticipate being haled into Court there. See *Kulko v. California Superior Court*, Supra, 436 U.S., at 97-98, 98 S.Ct., at 1699-1700; *Schaffer v. Heitner*, 433 U.S., at 216, 97 S.Ct., at 2586 and see *Id.*, at 217-219, 97 S.Ct., at 2586, 2587 (Stevens, J., concurring in judgment).

> The due process clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will or will not render them liable to suit. When a corporation "purposely avails itself of the privilege of conducting activities within the forum State", *Hanson v. Denckla*, 357 U.S., at 253, 78 S.Ct., at 1240, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, *but arises from the efforts of the manufacturer or distributor to serve directly or indirectly the market for its product in other States, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum state does not extend its power under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.*

World-Wide, at 297-298.

The Court in *World-Wide* found "in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of State Court jurisdiction." *Id.* at 295. Because Defendants closed no sale, performed no services, did not avail themselves of the privileges and benefits of Oklahoma law, solicited no

business through sales persons or advertising, reasonably calculated to reach the state, did not regularly sell cars at wholesale or retail to Oklahoma customers or residents, and did not directly or indirectly serve or seek to serve the Oklahoma market, the Court determined the Defendants had insufficient minimum contacts with the forum State of Oklahoma and thereby denied an exercise of personal jurisdiction over the Defendant. *Id.* at 295.

Applying the foreseeability concept as accepted by this Court to the facts at hand, it is clear that Petitioner should have reasonably anticipated being haled into court in Nebraska. Hosoya sold a large portion of its total output to Rich Bros. in South Dakota and through their business transactions was fully aware of the corporation's name, Rich Bros. Interstate Display Fireworks Company. The name alone should serve as notice to Hosoya that Rich Bros. engaged in sales outside of South Dakota. Furthermore, Hosoya participated in sales in the State of Missouri and should have reasonably inferred that the products sold to the South Dakota and Missouri corporations would enter their neighboring State of Nebraska. There are several other significant facts which indicate that Hosoya's contacts with Nebraska were not accidental. Hosoya placed a completed and finished product on the market within the United States. A single distributor in turn sold the product to Respondent Highland Country Club. There was no evidence of unilateral activity on the part of Highland to indicate that it brought the fireworks into the forum State singlehandedly. There was a long standing negotiation and sales process between Highland and Rich Bros. and Hosoya should have reasonably been on notice of these interstate transactions. It is evident

from these factors that Hosoya did, in fact, purposefully avail itself of the benefit and protection of the laws of Nebraska and thereby should have reasonably anticipated being haled into Nebraska to defend their interests in this action.

b. Petitioner's purposeful conduct in entering its product into the stream of commerce directed at Nebraska subjects it to Nebraska jurisdiction.

In developing the stream of commerce test in *World-Wide*, the Court distinguished between a case involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State due to a unilateral act of a consumer.

> The Respondents seek to base jurisdiction on one isolated occurrence and whatever inference can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happen to suffer an accident while passing through Oklahoma.

World-Wide, at 295.

Personal jurisdiction was not proper in *World-Wide* because the fact that the defendant's automobile caused injury in Oklahoma was a fortuitous event having nothing to do with the defendant's activities there, and that the defendant had done nothing to place the vehicle in that forum.

Hosoya's entire course of dealings with Rich Bros., its business solicitations and its substantial revenues derived

from the sale of its products in Nebraska, evinces Hosoya's intention to serve the Nebraska market. The fact that Hosoya utilized an American distributor does not diminish Hosoya's desire to supply the entire market served by Rich Bros., but merely demonstrates the commercial reality of the manufacturer/distributor relationship.

It was further stated by this Court in *World-Wide* that:

> (If) the sale . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer . . . to serve directly or indirectly, the market for its products in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

Id., 100 S.Ct. 567.

Hosoya urges this Court to believe the defective product found its way into Nebraska by the unilateral act of Respondent Highland Country Club. Hosoya's deliberate and continuous placement of its products into the Rich Bros. distribution network was neither fortuitous nor unintended.

In the case at hand, it was readily apparent from the facts that Hosoya's products reached the forum State of Nebraska through a chain of distribution involving a sole intermediary, Rich Bros. It was not, as was the case in *World-Wide*, a unilateral or isolated act by Highland Country Club which brought the product into Nebraska. Highland regularly purchased Hosoya's products in volume throughout the years preceding 1988. There was

substantial evidence presented to the Court through Michael Rich's Affidavit and Defendant Hosoya's Answers To Interrogatories that Hosoya indirectly served the market in Nebraska for its products. Because Hosoya's allegedly defective merchandise was a source of injury to Barone, it is therefore reasonable to subject Hosoya to defend an action brought in Nebraska.

The Supreme Court most recently examined the "stream of commerce" theory of personal jurisdiction in *Asahi Metal Industry Co. Ltd. v. Superior Court of California*, 480 U.S. 102 (1987). The Eighth Circuit, in *Falkirk Mining Company v. Japan Steel Works, Ltd.*, 906 F.2d 369 (8th Cir. 1990) applied the *Asahi* Court's holding. These cases involved similar though not identical facts. In both cases, a manufacturer of a component part sold that part to another company which in turn sold its final product into the forum State. In *Asahi* these sales into the forum State were of significant quantity and continued for several years, while in *Falkirk* the sale was a single occurrence. In both cases the ultimate consumers were injured, allegedly due to defects in the component parts, and sued the component part manufacturers in the States in which the injuries occurred. The plaintiff in *Asahi* eventually settled his suit, but the action for indemnity for the Taiwanese company that sold the final product into California and the Japanese company that manufactured the allegedly defective component part remained to be litigated. This Court eventually held that the exercise of personal jurisdiction over the component manufacturer in a California State Court did not comport with due process because it was unreasonable to subject the Japanese company to suit in California when neither the plaintiff nor the forum

State had any significant interest in the outcome and when it would place a severe burden on the Japanese company. That Court stated:

> We have previously explained that the determination of the reasonableness of an exercise of jurisdiction in each case will depend on an evaluation of several factors. The Court must consider the burden on the defendant, the interest of the forum State, and the plaintiff's interest in obtaining relief. It [the Court] must also weigh in its determination "the interstate judicial systems interests in obtaining the most efficient resolution of the controversy; and the shared interests of the several States in furthering fundamental substantive social policies."

Asahi, 480 U.S. 102, 114 (citing *World-Wide*, 444 U.S. at 292 (citations omitted)).

In the present case, the Petitioner's burden in litigating the matter in Nebraska is greater than it would be had the action been brought in Japan. However, it cannot be said to be unreasonable or unduly burdensome. Given the quantity of sales within the United States, Hosoya should have foreseen the prospect of litigation within the United States. The burden of defending in Nebraska is no greater that the burden placed on Hosoya in defending an action in Missouri or South Dakota, given Nebraska's close proximity to those States. Nebraska's interest in litigating the matter is very strong and evidenced by the fact that the injury to Barone arose within the State of Nebraska. Furthermore, the number of fireworks sales within Nebraska made by Rich Bros. and involving the products manufactured by Hosoya further grant

Nebraska significant reason to be interested in the present litigation. The hazardous nature of fireworks and the potentially grievous injuries to Nebraska's residents also heighten Nebraska's interests. Barone's strong interest in a convenient and effective forum to pursue his cause of action must also be considered.

This Court in *Asahi* split on the question of whether the Japanese company had sufficient contacts with the forum State, with four justices indicating that it did not. *Id.* at 112 (opinion of O'Connor, J.), four justices indicating that it did, *Id.* at 117 (opinion of Brennen, J.), and three justices indicating, that although it was unnecessary to reach the question, they believe that:

> A regular course of dealing which results in deliveries of over 100,000 units annually over a period of several years would constitute purposeful availment even though the item delivered to the forum State was standard product marketed throughout the world.

Asahi at 122 (opinion of Stevens, J.).

The Petitioner asks this Court to rely on *Asahi* to interpret the facts of this case. The facts in *Asahi* are readily distinguishable from the present case. Unlike the Japanese counterpart in *Asahi*, Hosoya manufactured and directly shipped a finished product to an American distributor. The Respondents are Nebraska citizens and the cause of action arose within the State of Nebraska. The ambiguity of the *Asahi* decision and the differing facts between *Asahi* and the present case require this Court to rely upon *World-Wide* and other interpretative decisions in analyzing whether to exercise personal jurisdiction over Hosoya.

One of the most recent cases on this issue was decided last year by the Seventh Circuit Court of Appeals. The facts are quite similar to those in this case.

In *Dehmlow v. Austin Fireworks*, 963 F.2d 941 (7th Cir. 1992), the plaintiff, an Illinois resident working as a "shooter" for a Fourth of July fireworks display, was injured in Illinois when one of the fireworks manufactured and distributed by the Defendant detonated improperly, causing permanent injuries and disfigurement. The defendant manufacturer was a Kansas corporation which did a significant amount of business throughout the midwestern states. Defendant sold the defective firework which injured Dehmlow to a Wisconsin corporation which manufactures fireworks, distributes firework products and puts on fireworks displays. This distributor employed Dehmlow as a "shooter" for the display at which Dehmlow was injured. On defendant's motion, Dehmlow's suit was moved to the U.S. District Court for the District of Illinois, where the suit was dismissed for lack of personal jurisdiction.

In reversing the District Court's dismissal, the Court of Appeals considered the personal jurisdiction issue in light of "stream of commerce theory" applied throughout the federal court system. See *World-Wide Volkswagen v. Woodson*, supra. That Court of Appeals noted that the validity of the traditional stream of commerce analysis had been brought into question by the *Asahi* decision. However, the Court stated that because a majority of the U.S. Supreme Court had not yet rejected it, the stream of commerce analysis was still determinative.

The *Dehmlow* Court placed great emphasis on the defendant's knowledge that its product would be used in Illinois, thereby providing the degree of foreseeability of being haled before the Illinois Courts required under *World-Wide*. The *Dehmlow* defendant had placed no restrictions on the distributor as to where or to whom the products could be resold. It had also been advertised in national magazines. Likewise, Hosoya knew or should have known that its product would be used in Nebraska and other neighboring midwestern states by virtue of Rich Bros. Interstate Display Fireworks Company's marketing network. This network included instate sales representatives and advertising publications.

In *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660 (7th Cir. 1986), *cert. denied*, 479 U.S. 1092 (1987), the facts are strikingly similar to the present case. In that case, Giotis was injured at a Fourth of July party in Wisconsin by fireworks that had been brought to the party by a Minnesotan, who had in turn purchased the fireworks by mail from a national distributor, Capitol Fireworks Company. The fireworks in question had been purchased by Capitol from either Apollo, a Missouri Corporation with retail outlets in Missouri, or Red Rocket, a Missouri Corporation with offices in Missouri and Louisiana. Red Rocket and Apollo distributed fireworks into ten and fifteen different states respectively, but neither distributed fireworks into Wisconsin. There was no evidence in the record that either was aware of the scope of Capitol's sales efforts; see *Giotis*, 800 F.2d at 672 (Barker, J., concurring and dissenting). But the Court nonetheless found that jurisdiction over both Red Rocket and Apollo comported with due process.

> The *Giotis* Court held that when a seller, such as either Apollo or Red Rocket, heads a distribution network, thus "realiz[ing] the much greater economic benefit of multiple sales in distant forums, of which the purchase by the particular buyer who has brought suit is merely one example," its activities in that role may "satisfy the purposeful availment test" and it therefore may be sued by an injured buyer in the buyer's forum. 800 F.2d at 667. Although "[s]uch a seller, because of intervening levels of distribution, may not have mentally formed a purpose to sell its products to the particular individual buyer who is suing it, . . . the seller surely has purposefully chosen to sell generally to buyers in the forum State and reaps the economic benefit of doing so. A seller at the head of a distribution network thus satisfies the requisite foreseeability of due process where it "delivers its products into the stream of commerce with the expectations that [these products] will be purchased by consumers in the forum State." *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 85 L.Ed.2d 528, 105 S.Ct. 2174 (1985), which in turn quoted *World-Wide Volkswagen*, 444 U.S. at 297-298). Apollo and Red Rocket were such sellers, in the *Giotis* Court's opinion, in that they "derived the same economic benefits from Capitol's wide scope of sales efforts as Capitol did," and there was "no evidence that [they] were unaware of the scope". *Id.* at 668.

Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, at 613.

The *Giotis* Court in asserting personal jurisdiction over the defendants found several factors justifying this result.

> First, the product was used in Wisconsin. *Bean Dredging Corp. v. Dredge Technology*, 744 F.2d 1081, 1085 (5th Cir. 1984). Second, the alleged defects surfaced in Wisconsin. *Id.* Third, a Wisconsin resident was injured and Wisconsin has a compelling interest in regulating the conduct of manufacturers that expose Wisconsin residents to hazards of defective products. *Id., Hedrick*, 715 F.2d at 1359.

Id., 800 F.2d at 668.

These factors are certainly applicable to the case at hand. First, Hosoya's fireworks were used in Nebraska. Second, the alleged defect surfaced in Nebraska. Third, a Nebraska resident was injured, and fourth, Nebraska has a compelling interest in regulating the conduct of manufacturers that expose Nebraska residents to hazards of defective products. In addition, the location of Hosoya's distributors suggests an effort to reach much of the country through a limited number of regional distributors. The Eighth Circuit properly found that:

> It is difficult to imagine that such strategicly placed distributors would be chosen merely by chance. Rather it is evidence of Hosoya's efforts to place its products into the stream of commerce throughout the midwest and other parts of the country as well.

Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 614 (8th Cir. 1994).

This language is consistent with what this Court held in *World-Wide*. The Eighth Circuit Court's decision is not in conflict with those of this Court.

Hosoya has reaped the benefits of its network of distributors, and it is only reasonable and just that it should now be held accountable in the forum where its defective product caused serious injuries.

B. The Court of Appeals' interpretation of the "stream of commerce" doctrine in *Barone* does not conflict with decisions of the other lower Federal Courts.

The Eighth Circuit Court of Appeals' interpretation of the stream of commerce doctrine in *Barone* is consistent with previous decisions in the Eighth Circuit, and is also consistent with decisions of the other lower Federal Courts.

The Eighth Circuit properly quoted from the Seventh Circuit decision in *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660 (7th Cir. 1986), *cert. denied*, 479 U.S. 1092 (1987). In deciding whether *Giotis* represented persuasive precedent, the Eighth Circuit examined the effect of *Asahi* and stated:

> Should one engage in vote counting, which we are loath to do, it appears that five justices agreed that continuous placement of a significant number of products into the stream of commerce with knowledge that the product would be distributed into the forum state represents sufficient minimum contacts to satisfy due process. In doing so, those justices simply followed the Court's earlier statement in *World-Wide Volkswagen* that when a manufacturer or distributor attempts to serve a market "directly or indirectly" . . . it is not unreasonable to subject it to

> suit in that market if its allegedly defective merchandise has there been the source of injury to its owner or to others. 444 U.S. at 297. *In any event, the Asahi decision cannot be held to undermine the holding in Giotis.* See *Dehmlow v. Austin Fireworks*, 963 Fed.2d 941, 946 (7th Cir. 1992) ("Because the Supreme Court established the stream of commerce theory, and a majority of the Court has not yet rejected it, we consider that theory to be determinative.")

Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 614 (8th Cir. 1994) (emphasis added).

The Fifth Circuit in *Irving v. Owen Corning Fiberglass Corp.*, 864 F.2d 383 (5th Cir. 1989), *cert. denied*, 493 U.S. 823, reversed the District Court's dismissal of a products liability suit against a Yugoslavian company which exported asbestos to the United States. The Court measured the defendant's minimum contacts with the forum state by the stream of commerce standard as described in *World-Wide*, disregarding the ambiguous standards set out in *Asahi*. The Court stated that *Asahi* provided no clear guidance on the issue because the Court in *Asahi* failed to find personal jurisdiction over the Japanese manufacturers based on a failure to meet the second requirement of fair play and substantial justice "rather than on a failure to meet minimum contacts with the forum state". *Irving v. Owen Corning Fiberglass Corp.*, 864 F.2d 385-386. The Court explained:

> In *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 94 L.Ed. 92, 107 S.Ct. 1026, 94 L.Ed.2d at 92 (1988), the Supreme

> Court's most recent statement on personal jurisdiction, four justices favored a narrow interpretation of the stream of commerce doctrine in a case ultimately decided under the fair play and substantial justice prong of the due process test. Justice O'Connor advocated a requirement of "additional conduct" by the defendant to support personal jurisdiction under the stream of commerce theory. *Id.* 480 U.S. at 112, 107 S.Ct. at 1033, 94 L.Ed.2d at 104. Nonetheless an equal number of justices, while concurring with the pluralities analysis under the due process test second prong, refused to require a showing of "additional conduct" under the stream of commerce doctrine. *Id.* at 116-121, 107 S.Ct. at 1035-1038, 94 L.Ed.2d at 107-110. Because the Court's splintered view of minimum contact in *Asahi* provides no clear guidance on the issue, we continue to gauge *Jugo Metal* minimal contact with Texas by the stream of commerce standard as described in *World-Wide Volkswagen* phrase, *Jugo Metal* [the defendant] reasonably should have anticipated being haled into a Texas Court given its contacts with the forum.

Id., 864 F.2d 385-386.

The *Irving* Court made the determination that the defendant had the requisite minimum contacts with the forum State, Texas, because they reasonably should have anticipated being haled into a Texas Court given its contacts with that forum State.

In *Vermeulen v. Renault U.S.A. Inc.*, 985 F.2d 1534 (11th Cir. 1993), the plaintiff brought a product liability suit seeking damages for injuries sustained in an automobile

accident. The District Court dismissed the French automobile manufacturer for lack of jurisdiction but on appeal the Court of Appeals held that the manufacturer possessed sufficient contacts with Georgia to satisfy due process and notions of fair play and substantial justice. In making that conclusion the Court stated:

> The fact that RNUR's contacts with Georgia were no greater than its contacts with any other state in which Renault products were sold is of no consequence; RNUR's availment of a national market through its active and profitable association with a national distributor constitutes purposeful activity directed at Georgia.

965 F.2d at 1028.

Renault relied heavily upon the Supreme Court's opinion in *Asahi*. However, the Eleventh Circuit distinguished that case by stating:

> This case is different in kind from *Asahi*. First the plaintiff in this case is not a foreign corporation seeking indemnification from another foreign corporation, as in *Asahi*, but rather a Georgia resident, who seeks relief from the crippling injuries she suffered as a result of an alleged defect in her Renault car. Her interests in having her case adjudicated in Georgia is manifest.
>
> Second, this case, unlike *Asahi* is not about indemnification but rather about product safety. Georgia's interests in adjudicating is also manifest, given that it had a compelling interest in protecting its residents from unsafe products that find their way into the State . . .

> Fourth, although witnesses and evidence concerning the cars manufacturer and design are located in France, evidence and witnesses concerning the accident itself are located primarily in Georgia; furthermore, dismissal of RNUR from the plaintiff's suit would not end the litigation, but would merely splinter it, leaving plaintiff and the other defendants' in Georgia, while allowing plaintiff to proceed against RNUR in France. Thus, efficient resolution of this case suggests that jurisdiction be asserted over RNUR in Georgia . . .
>
> In short, this is not "one of those rare cases in which minimum requirements inherent in the concept of 'fair play and substantial justice' . . . defeats the reasonableness of jurisdiction even [though] the defendant has purposely engaged in foreign activities." . . .
>
> Thus we hold that RNUR possesses sufficient contacts with Georgia to satisfy due process requirements, and that Georgia's exercise of jurisdiction with RNUR comports with traditional notions of fair play and substantial justice.

985 F.2d at 1539.

The facts of this case indicate that Petitioner, by the quality and nature of its conduct and activities has purposefully availed itself of the protection and benefits of Nebraska law. This Petitioner, when it sold to Rich Bros., knew or should have known that its product would be sold in the midwest, including the State of Nebraska.

C. *Barone* correctly held that Respondent Barone need only establish a prima facie cause of action against Petitioner.

In the *Barone* opinion, the Eighth Circuit disagreed with the Petitioner's argument that "the uncertainty over who actually manufactured the offending firework precludes jurisdiction . . . " (Pet. App. 2) The Court stated "Barone need simply establish a prima facie cause of action," citing *Falkirk Mining Co. v. Japan Steelworks Ltd.*, 906 F.2d 369, 373 (8th Cir. 1990). (Pet. App. 2)

The Petitioner would have this Court look to *Pennfield v. Meadow Valley Elec. Inc.*, 604 A.2d 1082 (Pa. Super. 1992), where the Court held the lower Court properly sustained preliminary objections to a complaint which sued two cable manufacturers. In that case, the appellant in the strict liability count of its complaint stated "the electrical cable installed at Mountainview was bought either from Yesco or Tristate". It is important to note that this case is a Pennsylvania lower Court decision. The State of Pennsylvania retains a fact pleading system of procedure. See PA. R. Civ. P. 1019(a) ("material facts . . . shall be stated"). The Federal Rules of Civil Procedure acknowledge notice pleading. See Fed. R. Civ. P. Rule 8(e)2. With this distinction in mind, it is not necessary for Respondent to plead with certainty who actually manufactured the offending firework. The Eighth Circuit Court properly held that Barone need not prove that Petitioner committed a tort by a preponderance of the evidence. That is Respondent's burden of proof at trial. Rather, Barone meets his burden as to the first prong of the personal jurisdictions test by establishing a prima facie

cause of action in his Complaint. *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, supra. (Pet. App. 2)

CONCLUSION

For the above and foregoing reasons, the Eighth Circuit Court of Appeals' decision in *Barone* allowing Nebraska's exercise of personal jurisdiction over Petitioner comports with the requirements of due process as set forth in *International Shoe* and its progeny. Therefore, this Court should deny this Petition for Writ of Certiorari.

Respectfully submitted,

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